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IN THE SUPREME COURT OF THE UNITED STATES

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LAWRENCE GOLAN, ET AL., :

Petitioners :

v. : No. 10-545

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, October 5, 2011

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:06 a.m.

APPEARANCES:

ANTHONY T. FALZONE, ESQ., Stanford, California; on
behalf of Petitioners.

DONALD B. VERRILLI, JR., ESQ., Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-545, Golan v. Holder.

5 Mr. Falzone.

6 ORAL ARGUMENT OF ANTHONY T. FALZONE

7 ON BEHALF OF THE PETITIONERS

8 MR. FALZONE: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Section 514 did something unprecedented in
11 American copyright law. It took millions of works out
12 of the public domain, where they had remained for
13 decades as the common property of all Americans. That
14 violated the Copyright Clause and the First Amendment.

15 Let me turn first to the Copyright Clause.
16 In Eldred, this Court held Congress gets to pick the
17 date on which a copyright expires, and it can extend
18 that date before we reach that date.

19 JUSTICE GINSBURG: You said that Congress
20 can set a time limit. In this case, we are dealing
21 with, let's say, Aaron Copeland, who gets the benefit of
22 copyright, and Congress says: No, we think Shostakovich
23 should be treated just like Copeland. Yes, we took care
24 of our own when we weren't part of the world community,
25 but now we are. And so all that Congress is doing is

1 giving Shostakovich works the same limited work as Aaron
2 Copeland. And why does that violate the limited-time
3 prescription?

4 MR. FALZONE: The problem is Congress is now
5 setting a second limit long after the first one has come
6 and gone.

7 JUSTICE GINSBURG: But the person -- the
8 person we are talking about, the work we are talking
9 about, never got the first limit. There was no, there
10 was no time, there was no time when that work could have
11 been protected. So why isn't it consistent with the
12 Copyright Clause to say, you are entitled to limited
13 time protection? We are not talking about a case where
14 you've had the protection, enjoyed it and then it
15 expired, and then Congress says: We'd like -- we like
16 your work so much, we are going to give you another
17 term.

18 What's affected here are people who were
19 unprotected. And Congress says we think that they
20 should have a limited time.

21 MR. FALZONE: So let me just clarify one
22 thing. Many of the works that were restored here did
23 get some time, 28 years, and were not renewed.

24 But to get back to your question about the
25 works that got none --

1 JUSTICE GINSBURG: They didn't get the
2 equivalent of what a U.S. author -- but let's take the
3 large category, because it's the ones that you feature.
4 We are talking about Shostakovich, Stravinski, and I
5 say: Well, what's wrong with giving them the same time
6 that Aaron Copeland got?

7 MR. FALZONE: Congress has been setting the
8 limited time at zero since 1790. In the 1790 Act,
9 Congress set the limit at zero for a wide array of
10 works, those that did not comply with formalities, those
11 that were written by foreign authors --

12 JUSTICE GINSBURG: That's not a limited
13 time. That's saying you have no time.

14 MR. FALZONE: Well, but saying you have no
15 time is itself picking the limit because the language of
16 the Copyright Clause forces Congress to pick a limit
17 that constraints copyright by marking its end. And when
18 -- If a limit does not mark the end once reached, then
19 there is no limit, there is no end.

20 JUSTICE GINSBURG: But it has to have a
21 beginning, too. And for these people who were
22 unprotected, because we didn't recognize their
23 copyright, there is no beginning.

24 MR. FALZONE: No, there does not need to be
25 a beginning. It is within Congress's discretion.

1 Remember, this is permissive. Congress may grant
2 exclusive rights, but it can also say your limit is
3 going to be zero, we decide that you're not going to get
4 any exclusive rights.

5 Every Congress since 1790, every time it
6 went to add subject matter, every time it went to extend
7 the duration of copyright, respected that choice to give
8 no time. And in fact, the time -- the decision to make
9 foreign authors ineligible is a decision that Congress
10 has never gone back on. None of the exceptions the
11 government points to remove anything from the public
12 domain that was placed there based upon a lack of
13 national eligibility. 200 years of history is crystal
14 clear about --

15 JUSTICE GINSBURG: I can understand your
16 argument that the public domain is untouchable. I'm not
17 sure I get that from the Constitution, that says to
18 secure to authors for a limited time the exclusive
19 right. That -- that's talking about what you can secure
20 to authors, so I don't see why using the words of the
21 Constitution "to secure to authors for a limited time,"
22 Congress can't say: We want every author to have a
23 limited time.

24 MR. FALZONE: Well --

25 JUSTICE GINSBURG: The foreign works that we

1 didn't give, we're not treating them any better. They
2 don't get a different startup date, but they get the
3 same end date as our own authors.

4 MR. FALZONE: Right. The -- the operative
5 language is the limited times restriction, and the limit
6 it requires Congress to pick is the date at which all
7 protection ends for good, and Congress has picked zero
8 since 1790, and respected that decision, and that is no
9 accident.

10 Because the -- the -- if -- if you want to
11 know what limited times means, if it means anything it
12 means if, for instance if Congress is not required to
13 respect an expiration date long after it's passed, or
14 its decision to deny a work any protection in the first
15 place --

16 JUSTICE GINSBURG: We're not talking about
17 expiration dates. So I'd like you to concentrate.

18 MR. FALZONE: Sure.

19 JUSTICE GINSBURG: That's not -- that's not
20 -- none of these -- none of these copyrights have been
21 extended beyond their expiration date. They just
22 weren't protected.

23 MR. FALZONE: Well, taking works that got no
24 protection -- if Congress is not required to respect its
25 decision to deny a work any protection in the first

1 place, we can never know whether we've reached the end
2 or not. And in fact that's the problem with the
3 government's theory. Its theory says all Congress has
4 to do is attach a nominal expiration date to any given
5 copyright. Well, if that's true, there is -- if that's
6 all you need, there is nothing stopping us from reaching
7 back de Tocqueville 100 years.

8 JUSTICE GINSBURG: But that is -- that is
9 not -- that is most distinctly not before this case, so
10 please let's not talk about a copyright that has been
11 protected, has expired, and Congress wants to revive it.

12 We are concentrating on what Congress did to
13 bring us into compliance with the worldwide system and
14 it's saying: We are giving a limited time to these
15 authors.

16 MR. FALZONE: Well --

17 JUSTICE GINSBURG: They never had a limited
18 time before.

19 MR. FALZONE: Well, I -- I was talking -- de
20 Tocqueville never got any time, because he was a foreign
21 author. Ben Johnson never got any time, but on the
22 government's theory we could give him 100 years right
23 now.

24 This statute did work differently. It
25 certainly restored copyrights into the existing period.

1 That's correct. That is an accurate description of this
2 statute. But that is not a limit that's contained
3 anywhere in the government's interpretation of limited
4 times.

5 JUSTICE GINSBURG: Did anyone in the same --
6 the same -- published the same year as de Tocqueville, a
7 U.S. author, that would have a copyright protection
8 today?

9 MR. FALZONE: I'm sorry. I didn't hear you.

10 JUSTICE GINSBURG: I gave the example of
11 Aaron Copeland versus Shostakovich. Let's go back to de
12 Tocqueville. Who has a copyright who published in what,
13 18 -- what was it -- 40s? Right.

14 MR. FALZONE: The answer is nobody. But
15 here is the problem. If Congress wanted to reach that
16 work, here's all it has to do on the government's
17 theory, and even under the mechanism of section 514.
18 All it needs to do today is extend existing terms 100
19 years, and then reach back and restore into that
20 existing term. So on the government's theory and even
21 by the mechanism on which this statute operates, the
22 government could reach back and protect de Tocqueville.
23 CHIEF JUSTICE ROBERTS: Under your -- under
24 your theory, let's say you have a copyright that expires
25 on October 5th, okay? On October 4th, Congress could

1 extend that for 25 years.

2 MR. FALZONE: Yes.

3 CHIEF JUSTICE ROBERTS: Right. But on
4 October 6th, they couldn't go back and extend it 1 day.

5 MR. FALZONE: That's exactly right, because
6 the limit the Copyright Clause requires us to pick is an
7 end date with permanent consequence. End dates are
8 about finality. If that end date doesn't have permanent
9 consequence, if it doesn't have finality, we can never
10 know if we've reached the end or not. The limit the
11 Framers knew was the limit of the Statute of Anne.

12 JUSTICE KENNEDY: But it -- it seems to --
13 it seems to me that that was rejected in -- in our most
14 recent and earlier case on copyright.

15 MR. FALZONE: In Eldred?

16 JUSTICE KENNEDY: Yes.

17 MR. FALZONE: No, No. Eldred said Congress
18 can move the limit back we reach it. But Eldred most
19 certainly did not say that Congress is free to ignore
20 the limit once we hit it, because if you can do that
21 then you never know if you've reached the limit or not.
22 The limit the Framers knew was the one in the --

23 JUSTICE SOTOMAYOR: Counsel, there was no
24 limit here, meaning these foreign works were never given
25 the opportunity to be copyrighted. Isn't that a

1 substantial difference from the hypothetical that you're
2 trying to proffer? You're -- the hypothetical -- and I
3 think that's what Justice Ginsburg was responding to --
4 is you had a copyright, it expired, and now Congress
5 wants to revive it. Isn't that different from not
6 having had the opportunity at all, and being given a
7 term to exploit your work and protect it?

8 MR. FALZONE: The answer is no, it's not
9 different; and Congress treated those situations exactly
10 the same in all 19 amendments over the span of 200
11 years.

12 JUSTICE SOTOMAYOR: The problem --

13 MR. FALZONE: It gave equal respect.

14 JUSTICE SOTOMAYOR: I -- I know, but it
15 didn't do it when it set up the copyright system.

16 MR. FALZONE: Oh, it did.

17 JUSTICE SOTOMAYOR: In 1790, counsel, there
18 were three States that didn't give copyrights. There
19 were other States, and you make a big deal in your brief
20 about common law protection, but common law protection,
21 particularly in New York, which you relied on, only
22 extended to unpublished works. Once a work was
23 published, it was no longer protected under the common
24 law. That was true of most States. And some States
25 gave copyright protection to residents of their own

1 State but not to residents from other States.

2 So it took a whole body of public works and
3 gave them copyright protection the day they decided to
4 pass the copyright law. So what are you doing telling
5 us that there has never been a historical experience
6 with Congress taking public works out of the public
7 domain?

8 MR. FALZONE: Well, let me be clear about
9 what happened in 1790. The 1790 Act did not remove
10 anything from the public domain. The text is clear,
11 because insofar as applied to works already printed, it
12 presupposes existing copyrights explicitly in the text
13 of the act.

14 JUSTICE SOTOMAYOR: Read those words to me?

15 MR. FALZONE: So -- I'm looking at section 1
16 of the 1790 Act, and at -- at the beginning it talks
17 about: "After the passing of this act, the author and
18 authors of any map, chart, book or books already printed
19 within these United States, being a citizen thereof or
20 resident within, or his or her executors, administrators
21 or assigns, who have or have not transferred to any
22 other person the copyright of such map, chart, book or
23 books" --

24 JUSTICE SCALIA: Wait a minute. Who have or
25 have not transferred to any other person. So you don't

1 have to have a copyright, right?

2 JUSTICE SOTOMAYOR: You have to have a --

3 MR. FALZONE: You do have to have a
4 copyright. So it says "author or authors" and "have" is
5 the singular and have -- "have not" is the plural for
6 that.

7 JUSTICE SCALIA: Read it again? Who have --

8 MR. FALZONE: Sure.

9 JUSTICE SCALIA: -- or have not transferred
10 to any other person?

11 MR. FALZONE: Right. The copyright of such
12 map. It presupposes the existence of a copyright.

13 JUSTICE SCALIA: Oh. Oh; the copyright. I
14 got you.

15 MR. FALZONE: Yes. "The copyright" is the
16 key language. So the text makes it clear they
17 presupposed existing copyrights.

18 And let me speak to --

19 JUSTICE SOTOMAYOR: Your reading of that
20 passage is different than mine. I think it's a -- it's
21 saying whether you have or you haven't.

22 MR. FALZONE: But let me speak to the point
23 you raised about common law protection for published
24 works. You said New York provided no common law
25 protection for published works. With respect, that's

1 not correct. The Naxos v. Capitol Records case, the
2 highest court of New York, says New York common law
3 provided protection for published works right up to the
4 point where the Federal act cut it off.

5 And if you look -- and if -- if the question
6 is whether the first Congress intended to take anything
7 out of the public domain in 1790, the answer is you
8 simply cannot reach that conclusion, because everything
9 contemporaneous with the first Congress, the history of
10 the common law in Britain, decided by Millar v. Taylor
11 and Donaldson v. Beckett, recognized common law rights
12 in published works. The Federalist Papers spoke about
13 Millar, and everything contemporaneous --

14 JUSTICE SOTOMAYOR: If we disagree with your
15 proposition, does your argument fail? If the historical
16 work does not point to what you claim?

17 MR. FALZONE: You mean the 1790 Act or the
18 19 after it?

19 JUSTICE SOTOMAYOR: In 1790. If Congress
20 did what I believe it did, would your argument fail?

21 MR. FALZONE: No, I -- no. Not necessarily,
22 because of course that was the first Copyright Act and
23 Congress established a baseline. It had to start
24 somewhere. What we see 19 --

25 JUSTICE SOTOMAYOR: -- it started in the

1 place you want Congress to have started now.

2 MR. FALZONE: Well, no, but then --

3 JUSTICE SOTOMAYOR: It said, moving forward,
4 there is a Federal copyright. It didn't have to take
5 things out of the public domain. We are arguing about
6 whether they did or didn't. But assuming they did.

7 MR. FALZONE: Oh, I will assume they did.
8 They had to start somewhere. They wanted uniformity.
9 They created a statute that provided it.

10 When you look at every amendment, 19 times
11 in 200 years after that, Congress respected the
12 permanent consequence of the limits it chose, even when
13 those limits were a work gets no time whatsoever, based
14 on formality and noncompliance, based upon national
15 eligibility, based upon expiration of 28 years. It was
16 consistent each time it added subject matter, extended
17 terms, and --

18 JUSTICE KENNEDY: Can you tell me a little
19 bit about the phrase and the argument about the public
20 domain? Is in your view that just a synonym for when
21 the time has ended? Or is there something more
22 substantive to it that -- is it your position that the
23 public somehow owns what's in the public domain? I'm --

24 MR. FALZONE: Well, so to be precise, our
25 position is once Congress calls the limit, that is, once

1 it says this work is unprotected, whether it's the
2 expiration of 28 years or a decision to give it no
3 protection, it's creating affirmative rights in every
4 member of the public. Yes, they own it, and this Court
5 has recognized --

6 JUSTICE KENNEDY: But -- but how does the
7 phrase -- so the public domain is simply a conclusion to
8 express that, the operation of that principle? The
9 public domain doesn't have any more substantive meaning
10 other than to just express the conclusion that there is
11 a limited time?

12 MR. FALZONE: Well -- in -- in this case,
13 when I refer to the public domain, it's the collection
14 of things for which Congress had said protection is
15 done, it's over, we've hit the limit, it's done. So
16 things that went --

17 JUSTICE KENNEDY: Once again, it's just a
18 conclusion for the argument.

19 MR. FALZONE: I -- I think that's the
20 operative concept here. That's right.

21 JUSTICE GINSBURG: I think you gave an
22 analogy to the statute of limitations, and I thought you
23 were quite right about that. You can extend the statute
24 of limitations before it's expired, but once it's
25 expired it's over.

1 The problem with using that as an analogy is
2 that there was a beginning. Time ran out, and you're
3 trying to deal with a situation here where you say, you
4 know, the time was limited for the U.S. work, but it's
5 unlimited; you -- you cannot treat the foreign work --
6 you cannot give it a limited time, the same limited time
7 that you would give a U.S. work. You're saying these
8 people had no time and they may never have time.

9 MR. FALZONE: They had no time because
10 Congress decided that their works were going to be
11 ineligible, and a limit of zero is one Congress has been
12 setting since 1790, and respected consistently.

13 If the Chief Justice gives me a limited time
14 for oral argument, I might say no thanks, I have nothing
15 to say. And we all know I can't come back tomorrow.

16 JUSTICE GINSBURG: But it isn't quite so,
17 because there are these examples of people who couldn't
18 get copyright because of wartime after both World War I
19 and World War II, and -- so those people were allowed to
20 get the protection that they couldn't get because of the
21 war.

22 MR. FALZONE: That's correct. That's what
23 those statutes did. They were never challenged. And
24 make no mistake, our position is, insofar as they
25 removed anything from the public domain, they are

1 unconstitutional.

2 But even if the Court doesn't want to go
3 that far, I think the wartime statutes and the other
4 small handful of exceptions the government points to fit
5 quite well into a very limited exception for eligible
6 authors who show nothing more than the familiar concept
7 of excusable neglect, which has operated -- again, in
8 very narrow situations -- to relieve people of the
9 consequences of deadlines.

10 CHIEF JUSTICE ROBERTS: What about new
11 categories? You know, architecture. Congress decides
12 we're going to extend copyright protection to
13 architectural design, and they say -- and we are going
14 to go back 5 years, so any new architectural design
15 conceived or constructed, whatever, within the last 5
16 years gets protection, and it goes on for another 15.

17 MR. FALZONE: Right. So -- so -- of course,
18 to be clear, that's not what Congress actually did when
19 it protected architectural works.

20 CHIEF JUSTICE ROBERTS: No, no, I know.

21 MR. FALZONE: It looked forward, right.

22 But that -- so in that case, the -- the
23 Federal scheme, if it had not previously regulated
24 architectural works, it had not -- there had been no
25 decision as to what the limit was going to be, so you

1 may pose a different question.

2 Here, we are talking about works that were
3 affirm -- affirmatively within the Federal scheme --

4 CHIEF JUSTICE ROBERTS: No, no, I'm just
5 trying -- trying -- I'm trying to test the limit of your
6 public domain argument.

7 MR. FALZONE: Sure.

8 CHIEF JUSTICE ROBERTS: Does it extend to
9 new categories of copyrightable works?

10 MR. FALZONE: I think the answer is the
11 retrospective portion of that statute flunks progress of
12 science but -- but passes limited times.

13 JUSTICE SCALIA: Would you -- would you
14 spend a little bit of time on your other argument, I
15 take it to be a separate argument apart from the -- you
16 know, time limit argument, the argument that the problem
17 here is that this law does not promote the progress of
18 science and useful arts, and therefore does not comply
19 with the Copyright Clause?

20 MR. FALZONE: That's right.

21 JUSTICE SCALIA: Why doesn't it promote the
22 progress of science and the useful arts?

23 MR. FALZONE: So -- the -- the progress of
24 science corresponds roughly to the creation and spread
25 of knowledge and learning. A statute that does nothing,

1 like this one, does nothing but take old works out of
2 the public domain without any impact on prospective
3 incentives, cannot stimulate the creation of anything.
4 And as for things that already exists, it cannot
5 stimulate the spread of them. All it can do is restrict
6 the spread of things that could warrant --

7 JUSTICE SOTOMAYOR: You don't think that
8 there are some foreign authors who didn't or wouldn't
9 come into the U.S. market because they couldn't protect
10 their works here, and kept their works in other markets
11 that -- in which it was protected?

12 MR. FALZONE: Well, I don't --

13 JUSTICE SOTOMAYOR: And it doesn't encourage
14 them to sort of make investments?

15 MR. FALZONE: No. This statute does not and
16 cannot do that, because --

17 JUSTICE SOTOMAYOR: Why not? Foreign
18 authors who decided not to exploit their works here
19 wouldn't be induced to think about coming into this
20 market because now they can protect their works?

21 MR. FALZONE: Well, whether they came into
22 this market or not has no effect on whether they can
23 protect their works or not. They were unprotected
24 whether they came into this market or not. They would
25 be protected --

1 JUSTICE SOTOMAYOR: You're -- you're not
2 answering my question. You don't think that this law
3 induces those foreign authors to come here and promote
4 their work?

5 MR. FALZONE: I don't -- I don't see how it
6 could.

7 CHIEF JUSTICE ROBERTS: Well, one way it
8 could, I suppose, is that it shows that Congress is
9 interested in making sure that American authors overseas
10 have reciprocal protection, an issue that could come out
11 in a variety of contexts. And if I'm sitting there
12 writing a great novel, I will have the confidence that
13 my government will ensure that I get protection when it
14 becomes a bestseller in China; right.

15 MR. FALZONE: Yes.

16 CHIEF JUSTICE ROBERTS: Well, that's --
17 that's an incentive.

18 MR. FALZONE: Yes. And you were assured of
19 that incentive in 1988, when we joined the Berne
20 Convention without removing anything from the public
21 domain, because when you sit down to write that book
22 today, that work will absolutely be protected in all of
23 the Berne and WTO countries. So the incentive effect
24 was achieved and achieved in full --

25 CHIEF JUSTICE ROBERTS: No, I'm talking

1 about --but the same issue can come up again, you know,
2 whether it's in the area of formalities, whatever.
3 There may be another problem where there is a dispute
4 between other countries and our country. And I will
5 know that in the past, the United States has taken
6 action looking out for -- for the interests of American
7 authors.

8 MR. FALZONE: That's --

9 CHIEF JUSTICE ROBERTS: That's an incentive.
10 Now, it may be, as I think it was described in the court
11 of appeals decision, a "meager" incentive. You may be
12 more interested in other protections. But it's -- we
13 haven't really required much more than that.

14 MR. FALZONE: Perhaps. I mean, there's
15 nothing in -- in -- in the record before Congress here
16 to reflect the fact they made any such conclusion.

17 JUSTICE SCALIA: Let me put it -- I think
18 it's the same point another way. Let's assume I'm a
19 multibillionaire and I receive an award as a great
20 patron of the arts because I have furthered the arts by
21 giving several million dollars to someone who has
22 already composed an opera or who has already written a
23 book. Wouldn't -- wouldn't I be furthering, be viewed
24 as furthering the arts?

25 MR. FALZONE: Potentially, but the problem

1 here, if I can move a little bit to the First Amendment,
2 is the mechanism Congress chose to use here. They chose
3 to create that reward by taking away core public speech
4 rights from the American public, and transforming them
5 into somebody's private property --

6 JUSTICE SCALIA: Well, that's what the
7 copyright law permits -- the -- the -- excluding things
8 from the public domain, so long as in the process of
9 doing it, you're furthering the arts.

10 MR. FALZONE: Well -- but let me focus on
11 the First Amendment problem. An ordinary copyright
12 statute does not revoke the public's Federal right to
13 copy and use works in the public domain. That is
14 exactly the thing Congress refused to do 19 times over
15 200 years. And that's the huge departure from
16 traditional contours of copyright protection that
17 triggers First Amendment scrutiny here. And when you go
18 to ask the First Amendment question, you can't ignore
19 the mechanism Congress chose to use here, which is to
20 take away public speech rights, and turn them into
21 somebody else's private property.

22 That was the explicit motivation of -- of
23 the people who came before Congress and asked them to
24 pass this statute. That is the justification the
25 government --

1 JUSTICE KENNEDY: But now you're saying that
2 there is a substantive component to this public domain
3 argument, that the public does own something. And
4 that's different from what I thought you answered
5 earlier when you said it's just conclusory for a limited
6 time.

7 MR. FALZONE: In that case, I misspoke. The
8 public -- the public domain is owned collectively by the
9 public, and in fact, decisions of this Court going back
10 to the 19th century refer to it as public property. And
11 I think --

12 JUSTICE BREYER: I'm curious. To go back a
13 second, I thought Justice Sotomayor's question was,
14 imagine Smith in Germany. He has written a book. It's
15 there, already exists, but it has no copyright
16 protection in the United States. So after this, would
17 he be more willing to send it to the United States? And
18 I take it your answer is no. The reason is because I
19 can go and buy a copy and sell it in the United States
20 even without this law. Is that right or wrong?

21 MR. FALZONE: I think -- I think that it
22 could possibly incentivize him to bring it over to the
23 United States, depending on how the statute worked.

24 JUSTICE BREYER: Well, isn't that the
25 question? The question is, now that Smith has the same

1 protection in the United States that Germany gave him,
2 doesn't that give him an incentive to send his book to
3 the U.S.? In thinking about that one, I thought: Not
4 much, because I can go buy it today without this law and
5 bring it to the United States and sell as many as I
6 want. Nonetheless --

7 MR. FALZONE: I think that's right.

8 JUSTICE BREYER: That's not right?

9 MR. FALZONE: No, I think you're correct. I
10 think you're correct. I think that's --

11 JUSTICE BREYER: Well, don't just jump on my
12 answer as being correct if it's not.

13 (Laughter.)

14 JUSTICE SOTOMAYOR: Counsel, it might be his
15 incentive to buy it or not, but the question is the
16 author's incentive to sell it here. Those are two
17 different incentives. Whether -- you know, he could go
18 anywhere and buy a cheaper book if he chose to take the
19 trip or get on the internet and find it. He could do
20 that now. Copyrighted materials here go at a different
21 price than they do elsewhere. That's not the issue.
22 The issue is the author's incentive.

23 MR. FALZONE: The -- the -- the problem here
24 is these authors are long gone. You can't incentivize
25 them. These works are so old they are long gone. You

1 can't incentivize anything that's happened so long ago.

2 If you could --

3 JUSTICE SOTOMAYOR: Well, if you can't
4 incentivize them, they are not going to claim their
5 rights.

6 MR. FALZONE: I'm sorry?

7 JUSTICE SOTOMAYOR: They are not going to
8 come and claim their rights. Part of this law is that
9 they have to declare that they are interested in
10 protecting their copyright here.

11 MR. FALZONE: No. Actually, that's
12 optional. It's optional for them to file a notice of
13 intent to enforce. It's optional for them to declare.
14 But the real problem is --

15 JUSTICE SOTOMAYOR: Optional for them; but
16 if they do, that's when they can sue a prior user.

17 MR. FALZONE: That's right. It -- Well, it
18 depends who they want to sue, but yes. They certainly
19 have broader rights once they file a notice of intent to
20 enforce. But that --

21 JUSTICE SCALIA: Of course, the assumption
22 of this line of questioning, I suppose, is that the mere
23 marketing in the United States of stuff that has already
24 been created promotes the progress of the useful arts.
25 I'm not sure it promotes the progress of the useful

1 arts. It makes more money for the guy who wrote it, but
2 doesn't incentivize anybody --

3 MR. FALZONE: That's right.

4 JUSTICE SCALIA: -- to create art.

5 MR. FALZONE: It's not going to incentivize
6 anybody to create anything, and it only restricts the
7 circulation of things that once circulated freely.

8 If I can reserve my time for rebuttal, I'd
9 like to do that.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. FALZONE: Thank you.

12 CHIEF JUSTICE ROBERTS: General Verrilli.

13 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

14 ON BEHALF OF THE RESPONDENT

15 GENERAL VERRILLI: Mr. Chief Justice, and
16 may it please the Court:

17 I'd like to begin by picking up on a point
18 that my friend made in response to Justice Ginsburg
19 suggesting that with respect to foreign works what
20 Congress has done is set the copyright term at zero. I
21 don't really think that's a fair description of the
22 situation. It obscures what Section 514 actually does
23 and what Congress is all about here. Since 1891,
24 Congress has concluded as a matter of copyright law that
25 foreign works are entitled to the same protection as

1 domestic works. The problem with respect to the authors
2 that Section 514 covers is not that Congress set the
3 copyright limit at zero, it's that as a matter of
4 foreign relations, we did not have treaties with these
5 individual countries. And what 514 does is remedy that
6 be problem. What 514 says is: With respect to a
7 defined set of foreign authors, they get the remainder
8 of the copyright term that they would otherwise have
9 gotten, and nothing more, had they lived in countries
10 where we had -- with which we had copyright relations at
11 the time they published, or had they complied with the
12 formalities that we used to enforce but no longer do to
13 perfect and renew copyrights. That's what it does. It
14 doesn't grant anybody a perpetual term. It does not
15 renew a copyright term that has run its full course and
16 create a new one. It rectifies that problem which
17 doesn't, doesn't reflect anything about a congressional
18 judgment setting the copyright term at zero. It
19 could --

20 JUSTICE ALITO: Could Congress grant
21 copyright protection to works that had lost that
22 protection due to the expiration of the period that was
23 provided for under, under previous law?

24 GENERAL VERRILLI: We think that the, there
25 isn't an ironclad limit that can be derived from the

1 text of the Copyright Clause or from history that would
2 say that Congress is forbidden in any circumstance from
3 doing that. We do think that there are significant
4 limits in the text of the Copyright Clause that would
5 restrict any ability Congress might have to do that.
6 But one thing I think is important here is that Section
7 514 is not a statute in which Congress did that, and we
8 would respectfully suggest that any assessment by this
9 Court of whether Congress had that power should await a
10 concrete context in which Congress exercises it, if it
11 ever does.

12 JUSTICE SOTOMAYOR: What's the limit that
13 you're referring to?

14 GENERAL VERRILLI: Excuse me, Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: You said there are
17 limits.

18 GENERAL VERRILLI: Yes.

19 JUSTICE SOTOMAYOR: What --

20 GENERAL VERRILLI: Well, one limit I think
21 is a quite important one is that the Copyright Clause
22 says that you can only grant copyright in authors, to
23 authors. And as a work gets older and older when you're
24 talking about Shakespeare and Ben Johnson, there really
25 at that point isn't an author in which you could vest

1 the copyright. And creating any copyright for a
2 long-expired work like that would really, I think, raise
3 the problem that the framers were addressing by
4 restricting copyright to authors which was to avoid the
5 creation of patronage monopolies in which publishers who
6 weren't the authors could claim the exclusive rights of
7 copyright.

8 JUSTICE ALITO: But doesn't this -- doesn't
9 Section 514 provide copyright protection for works that
10 were created by people who are long since dead?

11 GENERAL VERRILLI: Yes, it does.

12 JUSTICE ALITO: So I don't understand the
13 limit that you were just suggesting.

14 GENERAL VERRILLI: Well, because they --

15 JUSTICE ALITO: Do they have to be dead for
16 some period of time before --

17 GENERAL VERRILLI: No, but it --

18 JUSTICE ALITO: Congress is unable to give
19 them back their copyright?

20 GENERAL VERRILLI: No. What 514 does,
21 Justice Alito, is provide copyright protection to works
22 of foreign authors whose works still have copyright
23 protection in their own country, whether they are dead
24 or alive. So long as the work has protection in the
25 country, then 514 provides copyright protection. And

1 the reason it does so is to ensure our compliance with
2 the Berne Convention. And the why here is very
3 important and I think provide the answer to Justice
4 Scalia's question about how 514 contributes to the
5 progress of arts and sciences. What 514 does, 514 is,
6 in essence, the price of admission to the international
7 system. We decided, the policymaking branches of our
8 government, the executive and the Congress, decided that
9 we needed to be, and was in the national interest, to be
10 part of the international copyright system and to join
11 the Berne Convention to accomplish that. The reason we
12 did so was because our intellectual property is subject
13 to very serious levels of piracy in many foreign
14 countries because of under enforcement. By joining
15 Berne, what we did was commit ourselves to the
16 international standards. And by enacting Section 514 to
17 implement the Uruguay Round Agreements in 1994, what we
18 did was say to the world that we are going to ensure
19 compliance in this country.

20 JUSTICE SCALIA: General Verrilli, I do not
21 find that an appealing argument. It seems to me
22 Congress either had the power to do this under the
23 Copyright Clause or it didn't. I don't think that
24 powers that Congress does not have under the
25 Constitution can be acquired by simply obtaining the

1 agreement of the Senate, the President and Zimbabwe. I
2 do not think a treaty can expand the powers of the
3 Federal government. I mean, this is either okay under
4 the copyright clause or it isn't.

5 GENERAL VERRILLI: We completely --

6 JUSTICE SCALIA: It would be nice to know
7 the reason for it, but you would still have to establish
8 that it's within the power of the Federal government --

9 GENERAL VERRILLI: We completely agreement
10 with that, Justice Scalia. There is no textual limit in
11 the Copyright Clause that would preclude Congress from
12 enacting this statute.

13 The Petitioners have also raised a First
14 Amendment argument. We don't think First Amendment
15 scrutiny applies here. To the extent it did, the why
16 would matter there, and there is definitely a
17 substantial interest on the part of Congress in, in
18 ensuring compliance with Berne and getting protection
19 for our works in Berne. Now in Eldred, the Court did
20 say, I think quite clearly, that there is no requirement
21 under the Copyright Clause that a new financial benefit
22 granted through an existing, that a new financial
23 benefit cannot be granted to an existing work.

24 JUSTICE BREYER: No, but in Eldred the main
25 difference is that in Eldred, there was a law that

1 might, at least in principle, have elicited a new book.
2 And in this case, by definition, there is no benefit
3 given to anything at all that is not already created.

4 GENERAL VERRILLI: I disagree.

5 JUSTICE BREYER: So by -- How does it give
6 any benefit to anything because it's already created.

7 GENERAL VERRILLI: Because it creates
8 additional incentives for authors today and going
9 forward, because they know that there is a much greater
10 likelihood that whatever intellectual property they
11 create will be better protected in foreign countries as
12 a result of our joining the Berne Convention.

13 JUSTICE BREYER: How does this provision do
14 that? I think maybe there are other provisions, but I
15 thought this provision is talking solely about books,
16 for example, that are already created.

17 GENERAL VERRILLI: Well --

18 JUSTICE BREYER: Is it not? I may have been
19 misreading, it but I certainly got that out of like 42
20 briefs and --

21 GENERAL VERRILLI: But we can't -- If we
22 can't get the protections of Berne, Berne is not a menu
23 in which we get to choose options.

24 JUSTICE BREYER: Oh, oh. Okay. Well, you
25 know, as you also know from the 42 briefs, that there is

1 a lot of argument that you could comply in other ways
2 that are less restrictive; and whether that's true or
3 not, is that -- there what you're saying is -- if I
4 parody it, it's not a fair reading I'm going to give --
5 but what you're saying is we are, here have a law which
6 says that libraries, music lovers, book buyers will
7 either pay more money for things already in existence or
8 will simply be unable to get them if they are orphans,
9 on the one hand, so that other countries will impose
10 similar kinds of restrictions upon their music lovers,
11 music goers, libraries and -- so that they pay more for
12 our works that are already in restrict -- that are
13 already produced, or simply can't use them because they
14 can't find who owns them.

15 Now that's in parody form, for succinctness.
16 What I think the argument is on the other side --

17 GENERAL VERRILLI: Right, but --

18 JUSTICE BREYER: And they will say, no
19 copyright law -- with your exception of when the country
20 was founded -- no copyright law has served that kind of
21 purpose. That's served often by tariffs --

22 GENERAL VERRILLI: But --

23 JUSTICE BREYER: -- but not by copyright
24 law.

25 GENERAL VERRILLI: But there is another way

1 of looking at that, Justice Breyer, of course, which is
2 that the, but for the fact that these individual authors
3 lived in countries that didn't have copyright relations
4 with the United States, they would have the protection
5 of our copyright law and they would have the term of
6 copyright --

7 JUSTICE BREYER: Not necessarily. There are
8 three categories. One is the category of the people who
9 you couldn't, because of the country; that's Egypt, I
10 think, and Russia. Their second is the category of the
11 people -- of sound recordings, and their third is
12 category which is not the null set, of people who did
13 not comply with certain registration requirements. For
14 example, I believe that the widow of Samuel -- Brittan
15 failed to renew her copyright, and there are probably
16 many that failed to renew the copyright after 28 years,
17 and the reason that they didn't is because they didn't
18 think there was much money in it, and those are the very
19 works that the libraries want to get ahold of and put in
20 their databases.

21 GENERAL VERRILLI: And there is no textual
22 limit in the Copyright Clause that says that Congress
23 cannot provide the same limited term to those categories
24 of works that it provides to other works. There just is
25 no textual limit.

1 JUSTICE BREYER: That's true, but for one
2 text. They say that text has to do with progress. And
3 when they read it historically in light of Macaulay, in
4 light of the Statute of Anne, in light of going back to
5 Venice and the copyrights, in light of going back to
6 letters between Madison and Jefferson -- that term has
7 always meant produce at least one new thing. And here
8 there is not one new thing.

9 GENERAL VERRILLI: And -- yes. Yes, there
10 is. First, with respect to Section 514, it's part and
11 parcel of joining Berne, and Berne gives protection not
12 only to the previously created works but to newly
13 created works, and it creates additional economic
14 incentives in foreign -- by assuring better protection
15 in foreign countries for newly created works. So it
16 creates many, many more than one new work. And I think
17 it's also quite reasonable, Justice Breyer, to read the
18 incentive structure here in a way parallel to the way
19 the Court did in Eldred, which is to say that just as in
20 Eldred the Court assumed that there was an implicit
21 guarantee to an author making a creation that that
22 author would get the benefit, not only of the existing
23 term of copyright but any extension, I think here with
24 respect to American authors, it's an implicit guarantee
25 that they get the benefit not only of the foreign

1 protection in existence at the time, but any expansion
2 of foreign protection through adjoining treaties, and
3 Article 8 and Section 514 implementing Article 18 of
4 Berne is the price of admission to that treaty --

5 CHIEF JUSTICE ROBERTS: General, there is
6 something at least at an intuitive level appealing about
7 Mr. Falzone's First Amendment argument. One day I can
8 perform Shostakovich; Congress does something, the next
9 day I can't. Doesn't that present a serious First
10 Amendment problem?

11 GENERAL VERRILLI: I don't think so, Mr.
12 Chief Justice, and I do think -- for a host of reasons.
13 One is I think that it's -- it's just not so simple, and
14 an -- I think the question that I think Your Honor asked
15 my friend was what about when Congress expands the scope
16 of exclusive rights for existing works? Well, Congress
17 has done that many, many times, and musical composition
18 is a really good example of that. In 1831, Congress
19 created exclusive right in the publishing and vending of
20 musical compositions, but not in their public
21 performance. So from 1831 on, once I bought the sheet
22 music, their -- public performance was borrow the
23 Petitioner's way of thinking in the public domain. You
24 could do it any time you wanted without having to get a
25 license to pay any money. But --

1 CHIEF JUSTICE ROBERTS: Well, that's --
2 that's -- one answer is that Congress has done this
3 before.

4 GENERAL VERRILLI: But then in 1897,
5 Congress granted an exclusive right in the public
6 performance of musical compositions --

7 CHIEF JUSTICE ROBERTS: Right.

8 GENERAL VERRILLI: -- and made it applicable
9 to all existing copyrights.

10 CHIEF JUSTICE ROBERTS: Okay. So do you
11 have an argument other than they have done this before?

12 GENERAL VERRILLI: Well, that they have done
13 it many times before and it's a process -- I think it
14 reflects -- and -- and the point is no one has thought
15 with respect to any of those significant adjustments of
16 the boundaries that it was an occasion for First
17 Amendment scrutiny. And I think that's because of the
18 wisdom of the Court's opinion in Eldred, that these are
19 --

20 CHIEF JUSTICE ROBERTS: But it's pertinent
21 under the First Amendment in other areas, right? It's a
22 different analysis if your claim is the government
23 should open up a park as a public forum, than if it's
24 been a public forum for 200 years and the government
25 decides to close it down. Maybe they can do it but it's

1 a different question.

2 So why isn't this a different question,
3 whether they can extend copyright protection that's
4 already there?

5 GENERAL VERRILLI: I think -- because I
6 think there is, once the Court gets into the business of
7 First Amendment analysis, there is no stopping point,
8 because all of the adjustments of the boundaries could
9 have the same kind of effect I think as the musical
10 composition -- show?

11 CHIEF JUSTICE ROBERTS: What about Jimmy
12 Hendrix, right? He has a distinctive rendition of the
13 national anthem, and all of a -- assuming the national
14 anthem is suddenly entitled to copyright protection that
15 it wasn't before, he can't do that, right?

16 GENERAL VERRILLI: What copyright does, by
17 definition, is provide exclusive rights in expression;
18 and so if the First Amendment is triggered whenever
19 copyright provides exclusive rights in expression that
20 it didn't used to provide, then heightened scrutiny will
21 apply any time Congress exercises its copyright power,
22 and what the Court said in Eldred --

23 CHIEF JUSTICE ROBERTS: So he is just out of
24 luck? And that's just one example of many, where you
25 take existing works and you have a derivative work or

1 something that is distinctive to you. So those people
2 are just out of luck?

3 GENERAL VERRILLI: Well, of course, under
4 Section 514 they are not out of luck because it has
5 significant protections and accommodations for
6 derivative works. The question of whether there should
7 be heightened First Amendment scrutiny, we think Eldred
8 answers, that -- that first the Copyright Clause already
9 contains very significant accommodations of First
10 Amendment interests. The idea/expression dichotomy,
11 fair use; and -- and that is going to provide -- maybe
12 -- maybe Jimmy Hendrix could claim fair use in that
13 situation.

14 And those are at the core of the traditional
15 contours of copyright. So if Congress were to try to
16 extinguish fair use, I'd say yes, we'd have a First
17 Amendment issue there. If Congress were to try to
18 provide exclusive right in the ideas that are expressed,
19 as opposed to the expression itself, yes, we would have
20 a First Amendment issue there. If Congress were to,
21 say, use the copyright power to engage in viewpoint
22 discrimination --

23 JUSTICE KENNEDY: Well, it seems to me what
24 you're saying, and I already gave this answer because
25 originally, I thought I was going to put in my notes,

1 the First Amendment does not apply to the copyright
2 area -- and that just can't be.

3 What you're saying is, is that this law will
4 pass intermediate scrutiny. It's an important
5 governmental interest and it's substantially related to
6 that.

7 GENERAL VERRILLI: We don't think it would
8 have any problem passing intermediate scrutiny, but we
9 don't think intermediate scrutiny ought to apply.

10 JUSTICE KENNEDY: But -- but -- can you --
11 can you cite me to some -- some authority which says the
12 First Amendment doesn't apply to a copyright?

13 GENERAL VERRILLI: No. We don't say it
14 doesn't apply, but Eldred.

15 JUSTICE KENNEDY: The First Amendment test
16 doesn't apply.

17 There has -- there has to be a -- a test.
18 Now maybe you say that it isn't immediate scrutiny; it's
19 something else. But -- but certainly the First
20 Amendment is implicated.

21 GENERAL VERRILLI: Yes. And what Eldred
22 said, as I read it, Justice Kennedy, is that unless
23 Congress alters their traditional contours of copyright
24 then ration basis scrutiny rather than any heightened
25 form of First Amendment scrutiny applies.

1 CHIEF JUSTICE ROBERTS: Even under -- even
2 under rationale basis scrutiny, it seems to me that you
3 run into Justice Breyer's concern that the government
4 interest is vanishingly small when it comes to promoting
5 progress under the Copyright Clause, so that the
6 interest weighed on the other side of the -- the
7 restriction of free speech rights, it's hard to say that
8 that's necessarily going to tip the balance in every
9 case.

10 GENERAL VERRILLI: I think it is going to
11 tip the balance, Mr. Chief Justice, because the -- the
12 reason Congress enacted section 514 at the urging of
13 executive branch officials who were charged with trying
14 to ensure that we could integrate ourselves into the
15 international system of copyright protection was that if
16 we didn't have this provision, then we were not going to
17 be taken seriously. Our works were not going to be
18 protected in these foreign countries, and that it would
19 defeat the purpose of joining Berne in the first place.

20 JUSTICE BREYER: It couldn't have been that
21 -- it must be somewhat overstated, mustn't it?

22 Because the only concern is not about
23 protecting new works in the foreign countries -- the
24 concern as I understand it was that we've had things in
25 copyright for many years, and we want retroactive

1 protection there. The countries that didn't give it,
2 like Japan, were not kicked out of the Berne Convention.

3 Rather, we pursued them in the WTO for many
4 years, and I guess somebody might pursue us and then you
5 get into an argument about whether there are other ways.
6 Now, is that strong enough to overcome what these briefs
7 are full of?

8 I'll give you an example. Save The Music is
9 charged with looking for Jewish music in the periods
10 '30s, '40s, and '50s. Other organizations might find a
11 treasure trove of literature that was -- that was
12 copyrighted in Czechoslovakia or in Warsaw, and they
13 want to put it on the web, and they want people to
14 listen to it. But they have no more idea of how to
15 track down the person on that, and they aren't protected
16 by any notice requirements because they aren't reliance
17 parties.

18 We're told by Barbara Springer, former
19 registrar, that there are millions of such instances
20 where people would like to go back and would like to put
21 music literature, film, et cetera, in a form that people
22 can use it today and there is no way to do it without
23 their becoming scofflaws, or without their having
24 millions of dollars to hire infinite numbers of trackers
25 and lawyers. Now, that's the argument that's made on

1 the other side, as the interest in communication that's
2 important.

3 What do you say?

4 GENERAL VERRILLI: So -- two points. First,
5 with respect to the interest in what foreign countries
6 will do, I think it's incorrect to assume that this will
7 be tit-for-tat, that if we don't enforce Article 18, the
8 only thing other countries won't do is enforce Article
9 18 with respect to our works, as opposed to believing
10 that we're not an -- an effective partner and not
11 enforcing their copyright laws for the whole purpose of
12 our works.

13 Second, Justice Breyer, that problem that
14 you identified just exists as a feature of copyright
15 law. Copyright law exists for a certain time. With
16 respect to those works, it's going to create that issue.
17 The problem here is just the result of a fortuity that
18 those works might have been published in a country that
19 at the time they were published didn't have copyright
20 relations with the United States. And what section 514
21 does is address that fortuity by putting those authors
22 in the same position they would have been in had their
23 country had copyright relations with the United States.
24 So I don't think that's a principled objection on a
25 constitutional basis --

1 JUSTICE BREYER: Right here, we have the
2 argument. I agree with you that it is a general
3 problem. It may be diminished in the United States but
4 it still exists. And I guess the argument here is well,
5 don't make it millions of times worse.

6 GENERAL VERRILLI: Well, it doesn't make it
7 millions of times worse. It applies to a small number
8 of -- but a significant number of countries --

9 JUSTICE BREYER: Barbara Springer said a
10 million, numbers it in the millions. Do you want to say
11 that's --

12 GENERAL VERRILLI: No, we don't have any
13 reason to doubt the -- the aggregate number.

14 JUSTICE GINSBURG: That's presupposing that
15 they are all going to give notice.

16 GENERAL VERRILLI: Well, with respect to
17 reliance parties, that's certainly true. They would
18 have to give notice. It is the case, Justice Ginsburg,
19 that if you're not a reliance party, then there would be
20 an infringement even without notice, so I do think there
21 is something on that point. But again, I just think
22 that's a result of the fortuity of the countries not
23 having copyright relations with the United States. It's
24 not about the -- it's not anything integral as a matter
25 of constitutional principle -- the statute --

1 JUSTICE SOTOMAYOR: Marbury -- the Davis law
2 was passed. Had to go and pick out all the books it had
3 that were subject to copyright and throw them out, or do
4 what with them?

5 GENERAL VERRILLI: I -- I don't think --

6 JUSTICE SOTOMAYOR: Stop them from
7 circulation? I'm not sure -- how would they protect
8 themselves from infringement?

9 GENERAL VERRILLI: Yes. I don't think that
10 they had -- I don't think -- I don't think there is an
11 active infringement by having a library book on the
12 shelf, and of course, there are protections for
13 libraries built into the Copyright Act in all events.

14 And I do -- if I could in my remaining time,
15 I want to go back to the history that we started with,
16 because I do think it is important that there is no --
17 as a matter of text, I think it's clear -- there is no
18 unyielding requirement that you cannot restore copyright
19 to works in the public domain. I think the history
20 really does bear that out.

21 I think Justice Sotomayor had the history
22 exactly right, that in 1790, you had three states with
23 no copyright statutes. Of the 10 states with copyright
24 statutes, you had seven that did not provide copyright
25 to maps and charts, which the Federal statute did. And

1 I think this is the key point: Of the states that did
2 enact copyright statutes to -- in the 1780s in advance
3 of the 1790 Federal Act -- at least four, and depending
4 on how you counted -- as many as eight provided
5 copyright protection only to works printed after the
6 date of the State statute. They did that at the urging
7 of the Continental Congress in 1783.

8 So I don't think there is any doubt that
9 when Congress enacted the Copyright Act of 1790, it made
10 a conscious choice to take a different approach, to
11 grant copyright protection to existing works, including
12 many, many, many works that were freely available for
13 exploitation in those states.

14 JUSTICE ALITO: Doesn't that show at most
15 that retroactive protection can be granted when there is
16 an enormous interest in doing so, namely, the
17 establishment of the uniform copyright system at the
18 beginning of the country, because if Congress had not
19 done that and had said the alternative would be to say
20 things can be copyrighted going forward, then you would
21 have different copyright laws in all of the States?

22 GENERAL VERRILLI: I think -- I don't think
23 so, Justice Alito. I think they could have followed the
24 model nationally of prospective copyright only, and
25 extinguishing the prior copyright, but they didn't make

1 that choice. They made a different choice. Now, my
2 friend suggests that the 1790 Act was just a transition,
3 but of course, the same thing is really true in an
4 important sense of section 514. It's part of a
5 tradition of a transition of the United States into the
6 international system, which has required an adjustment
7 of our rules in order to bring us into conformity with
8 the international system.

9 And beyond the example of course of the 1790
10 -- and by the way, with respect to that language in the
11 1790 copyright who have or have not copyright, that's
12 just a rerun of an argument that the Court rejected in
13 Wheaton v. Peters. In Wheaton, the Court said that --
14 that language in the 1790 Act was referring to pre-
15 publication common law copyright, not post-publication
16 common law copyright. Beyond that, it seems to me
17 pretty clear that what that language is referring to --
18 of course, Congress presupposes the existence of
19 copyrights, or at least State statutes that created some
20 copyrights -- but what Congress did was act far more
21 broadly.

22 And -- so I do think -- and then when one
23 looks at the examples of patents -- I think the -- the
24 Oliver Evans example, and that case, is an important
25 example, early in our history. Congress creates a new

1 patent term to an expired patent. President Jefferson
2 signs it. Secretary of State Madison issues it. Chief
3 Justice Marshall upholds it as a circuit justice, and
4 the Court upholds it against a charge that it's
5 impermissibly burdening people who act in reliance on
6 the expiration of the prior patent.

7 There wasn't a word in this Court's decision
8 in that case about any potential constitutional
9 infirmity with doing that. And one would think if this
10 was such a significant and viable principle of
11 constitutional law, that someone would have brought it
12 up in those cases. In fact, the striking thing about
13 reading the Evans decision is that the Court clearly
14 looks at this all as a matter of legislative policy
15 judgment. It says, you know yes, you're right, it might
16 have been an argument, a good argument in favor of
17 creating some reliance interest here, but that's a
18 judgment Congress should have made if anybody was going
19 to make it.

20 It didn't -- and there is no reading of the
21 -- there is no required reading of that statute that has
22 to protect the reliance party. So I don't -- I just
23 think when you look at the patent protection, when you
24 look at the 1790 Act, when you consider the fact that
25 when Congress expands exclusive rights, as it did for

1 example with respect to musical compositions but did in
2 the 1976 Act with respect to lots of exclusive rights,
3 it does so with existing copyrights.

4 And all of that points up to the wisdom of
5 what this court said in Eldred, that within very wide
6 margins, these are matters where legislative choice,
7 these are policy calls that require the balancing of a
8 complex set of interests, the drawing of a complex set
9 of lines made even more complex by virtue of the fact
10 that we are now trying to make a transition into full
11 participation in an international system, which is of
12 vital importance to protecting one of our most valuable
13 economic exports, intellectual property.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, General.

16 Mr. Falzone, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF ANTHONY T. FALZONE

18 ON BEHALF OF THE PETITIONERS

19 MR. FALZONE: Thank you. I have -- I have
20 four points to make. First one refusing to provide any
21 protection for a work is setting the term at zero. The
22 point of the limited times restriction is it -- excuse
23 me -- it forces Congress to tell us when the end has
24 come, and if Congress is forever free to change its
25 mind, then we can never know if the end has come.

1 Point number two, this statute does not and
2 cannot promote progress, that is, the creation and
3 spread of knowledge and learning. When we joined Berne
4 in 1988 we got all of its prospective benefits, or as
5 the government put it, secured the highest available
6 level of multilateral copyright protection for U.S.
7 artists, authors and their creators. This statute is
8 not about that. It's simply about rewarding people who
9 made things long ago. It's --

10 JUSTICE GINSBURG: At the time we joined
11 Berne, there was an appreciation that we deferred the
12 article 18 issue. There wasn't any -- anyone who said
13 that we satisfied it.

14 MR. FALZONE: No. There was an express
15 finding -- explicit finding written into the statute,
16 that -- and Congress found explicitly that we could
17 comply with all Berne obligations without removing
18 anything from the public domain.

19 Now, third point --

20 JUSTICE GINSBURG: Well there were many
21 people who read article 18 in a different way and
22 Congress was later persuaded that that was right.

23 MR. FALZONE: Congress never revisited that
24 finding. So no; they found what they found in 1988, and
25 they never revisited it.

1 JUSTICE GINSBURG: They -- they found that
2 compliance with article 18 was appropriate for us to
3 become a full member of the international copyright
4 community.

5 MR. FALZONE: Congress did not make that
6 finding, and I don't think you can even glean that from
7 the testimony that was presented to Congress. The
8 problem here is -- the -- the -- the right to use works
9 in the public domain has defined the freedom of speech
10 that the public has known since 1790. The 1790 Act made
11 these freedoms clear by placing works unambiguously and
12 clearly in the public domain, including all foreign
13 works. So even since before we had a First Amendment,
14 that has defined the freedom of speech that the public
15 knew.

16 And that right has also made sure that the
17 copyright sequence provides ever-increasing protection
18 for public speech rights. It gives partial protection
19 for some public speech interests during any initial
20 period of protection, but that blossoms into complete
21 protection for all public speech interests, once we
22 reach the limit Congress picks, once they place the work
23 in the public domain.

24 The burden on speech that this statute
25 imposes is remarkable. Let's start with the performance

1 right, which is central to my clients. There can't be
2 any doubt, as I think Chief Justice Roberts got at, that
3 the performance has a huge amount of original expression
4 bound up in it. It's the reason it's different to see
5 King Lear at the Royal Shakespeare Company; it's the
6 reason it's different when John Coltrane plays a jazz
7 standard. Huge amount of expression.

8 But even if you put performances aside, this
9 Court has recognized in case after case that there is a
10 critical speech interest in publishing the work of
11 another author, in showing a film created by another, or
12 for that matter performing the work of another, so that
13 the burden here is it took speech rights of 250 million
14 Americans and turned them into the private property of
15 foreign authors, all on the bare possibility that might
16 put more money in the pocket of some U.S. authors.

17 JUSTICE GINSBURG: All this rides on
18 accepting your argument that zero is a limited time.

19 MR. FALZONE: No. Not on the First
20 Amendment side. Not at all. No. No. No. No.

21 No. That is -- the First Amendment argument
22 is completely independent of that. Even if you find
23 Congress could do this on the Copyright Clause, we still
24 have that First Amendment problem, and the -- there is
25 no way the government can pass intermediate scrutiny

1 here.

2 This was not required by Berne. The
3 government does not even contend Section 514 was
4 required by Berne, nor could it, because that would
5 violate Congress's explicit findings they made in 1988.

6 JUSTICE GINSBURG: Would you say it was
7 would required by TRIPS?

8 MR. FALZONE: No. Because TRIPS just
9 implements Berne. So that the problem here is this
10 statute was not passed --

11 JUSTICE GINSBURG: We do not solve them if
12 we don't come ply with Berne 18, and we are subject to
13 being sanctioned by some World Trade Organization?

14 MR. FALZONE: There was very vague testimony
15 about the unsupported possibility that could happen, and
16 that's why the government falls back on this interest of
17 avoiding a dispute.

18 Here is the problem. If the government can
19 get around First Amendment limits by signing a treaty,
20 and then the flexibility to take away public speech
21 rights is defined by some complaint proffered by some
22 treaty partner, then the First Amendment is defined only
23 by the perceptions, the complaints and frankly the
24 imagination of foreign countries. That can't be the way
25 it works.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:05 p.m., the case in the
4 above-entitled matter was submitted.)

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